BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALE R. KINNEY, Claimant, v. LEA ELECTRIC, LLC., Employer, and INSURANCE COMPANY OF THE WEST, Surety, and ADVANTAGE WORKERS' COMPENSATION INSURANCE COMPANY, Surety, Defendants.	)	**IC 01-023050** **03-000628** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed June 1, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on January 5, 2005. Claimant was present and represented by Hugh Mossman of Boise. Thomas V. Munson of Boise represented Employer and its Surety, Insurance Company of the West (ICW). R. Daniel Bowen, also of Boise, represented Employer and its Surety, Advantage Workers' Compensation Insurance Company (Advantage). Oral and documentary evidence was presented. The record remained open for the taking of three post-hearing depositions. The parties submitted briefs and this matter came under advisement on April 18, 2005.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits; and,

2. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends he has incurred a substantial disability above impairment as the result of knee injuries sustained in two separate accidents with Employer. Claimant was working as a journeyman electrician and was in the process of getting his contractor's license when the last injury prevented him from returning to work as an electrician. He is currently employed as a supervisor at a landscaping business at less pay and with no benefits.

Employer and ICW, who were on the risk for Claimant's first accident, contend that while Claimant may be entitled to some PPD, the majority of that should be borne by Advantage, the Surety on the risk for Claimant's last accident. After Claimant's first accident and right knee surgery, Claimant was able to return to work without any problems; it was his last accident that rendered Claimant incapable of returning to his chosen profession as an electrician. Further, some of Claimant's PPI and PPD should be apportioned to pre-first accident as Claimant had previously had right knee surgery for some unknown condition.

Employer and Advantage contend that while Claimant may be entitled to some PPD, the majority of that should be borne by ICW. Claimant's first accident resulted in surgery for a pre-existing cartilage loss, a progressive degenerative condition that would have eventually restricted him from working as an electrician regardless of his last accident that resulted only in a meniscus tear.

Claimant replies that no apportionment is warranted for pre-first accident conditions, as there is no evidence that such condition prolonged his disability, as is a requirement of Idaho Code § 72-406.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing;

2. Claimant's Exhibits 1-5 admitted at the hearing;

3. Joint Exhibits 1-16 admitted at the hearing;

4. ICW's Exhibits A-K admitted at the hearing;

5. The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA *Guides*) of which the Referee takes judicial notice; and,

6. The post-hearing deposition of Ronald Kristensen, M.D., taken by Advantage on January 24, 2005, that of Michael T. Phillips, M.D., taken by ICW on January 31, 2005, and that of Rodde D. Cox, M.D., taken by Advantage on February 1, 2005.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 43 years of age at the time of the hearing and resided in Boise. He graduated from high school in 1980 and has six years of vocational training in the electrical field. He began working for Employer as an electrician in 1997. Claimant described his duties in November of 2001 as follows:

> "Very intense. A lot of underground, a lot of trench digging, a lot of running of trenchers, doing all the underground pipes. Climbing scaffolding to install conduit as they built the block walls. A lot of that. I did that all day long. A lot of kneeling. Gluing together pipes for months straight."

Hearing Transcript, p. 26.

2. On November 14, 2001 (first accident), Claimant's right knee became sore after operating a trencher all day. That evening while attending class at BSU, Claimant stepped down on a small step outside his classroom and, after that, was unable to put any weight on his right knee. He went to the emergency room that night where it was noted that he had a three-week history of right knee pain. The ER physician reached a diagnosis of right knee lateral meniscus injury. Joint Exhibit 11, pp. 225-226.

3. Claimant eventually came under the care of Ronald Kristensen, M.D., an orthopedic surgeon. On December 20, 2001, Dr. Kristensen performed a chondroplasty wherein he debrided the injured cartilage and drilled holes in the cartilage to try to induce new cartilage to grow in the injured area.[1] After a course of physical therapy, Claimant was released to work without restrictions on June 2, 2002.

4. On January 7, 2003 (second accident), Claimant slipped on a piece of cardboard at work and landed on his right knee. On February 27, 2003, Dr. Kristensen performed a repair of a tear of Claimant's right medial meniscus and "freshened up the cartilage" as the prior chondral injury had only partially healed. Dr. Kristensen's Deposition, p. 18. Claimant was released to work with restrictions on June 24, 2003.

5. Because Employer would not accept Claimant back with restrictions, he has not returned to work there. He is currently employed at a landscaping service where he is in charge of an automatic sprinkler repair crew.

[1] The operative report erroneously described the procedure as a right knee arthroscopic medial meniscectomy. Dr. Kristensen testified in his deposition that while Claimant's meniscus was "sickened" and perhaps prone to tear, it was clinically normal without any tearing.

DISCUSSION AND FURTHER FINDINGS

PPI and Apportionment:

While not specifically mentioned as an issue at hearing, the extent of Claimant's permanent partial impairment (PPI) and apportionment thereof is discussed in the briefs and in the physicians' reports and depositions and, because of the inseparable connection between PPI and PPD, will be discussed here. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Three physicians have expressed opinions regarding Claimant's PPI and apportionment: Michael T. Phillips, M.D., Rodde D. Cox, M.D., and Ronald Kristensen, M.D.

Dr. Phillips:

6. Dr. Phillips, an orthopedic surgeon, saw Claimant at ICW's request on June 12, 2002, and again on November 2, 2004, after the second accident. In his report dated June 13, 2002, Dr. Phillips opined Claimant incurred a PPI rating of 7% of the lower extremity with 3.5% of that apportioned to the first accident. After re-examining Claimant after his second accident, Dr. Phillips opined Claimant had incurred a PPI rating of 36% of the lower extremity

with 3.5% apportioned to the first injury and 3.5% apportioned to conditions pre-existing the first accident for a total of 29% lower extremity PPI attributable to the second accident. According to Table 17-3 of the AMA *Guides*, Fifth Edition, the 29% lower extremity PPI equates to 12% whole person PPI. At his deposition, Dr. Phillips revised the 36% to 22% lower extremity PPI after having re-reviewed the AMA *Guides*, Fifth Edition. The 22% is then reduced to 15% when the 7% for pre-existing conditions is subtracted. The 15% lower extremity equates to a 6% whole person PPI rating attributable to Claimant's second accident, according to the AMA *Guides*, Fifth Edition.

Dr. Cox:

7. Dr. Cox, a physiatrist, saw Claimant on September 3, 2003, at the request of CMS Case Management. Dr. Cox opined that Claimant had incurred a 10% whole person PPI for the 1mm cartilage interval of the medial compartment and 1% whole person PPI for the partial medial meniscectomy for a total of 11%. He deferred apportioning any of the PPI pending receipt of any prior PPI ratings and films. In a chart note dated November 17, 2003, Dr. Cox indicated that he had reviewed Dr. Kristensen's records regarding the first injury and learned that Claimant had a significant articular cartilage disruption from that injury. Therefore, Dr. Cox opined that the 10% whole person PPI for the cartilage interval should be apportioned 50-50 between the first and second accidents for a total of 6% for the second accident (5% second accident plus 1% non-apportioned meniscectomy equals 6%). However, at his deposition, Dr. Cox testified that at the time he authored the above chart note, he was not aware that a meniscectomy rather than a chondroplasty was performed in the 2003 surgery, so he changed his apportionment to 7% of the 10% chondral PPI to the first accident and 3% to the second.

Dr. Kristensen:

8. Dr. Kristensen, Claimant's treating physician, testified that he agreed with Dr. Cox's PPI rating, then testified somewhat equivocably that the 11% PPI should be apportioned as follows: 40% pre-existing the first accident, 40% first accident, and 20% second accident.

9. The Referee finds Claimant has incurred a whole person PPI of 11% (1% meniscal and 10% chondral/cartilage). Now, the challenge is to arrive at an appropriate apportionment. Initially, it is noted that Claimant underwent some sort of a right knee surgery in 1982 he described at hearing as a "meniscus trim." Hearing Transcript, p. 14. He also testified that he had a 100% recovery from that surgery. There are no medical records or films regarding that procedure in evidence nor were any provided to Drs. Phillips, Cox, and Kristensen. As was pointed out in Advantage's brief, "Counsel for these Defendants is aware that this Referee has historically been somewhat reluctant to apportion impairment to preexisting conditions, particularly where the preexisting impairment was asymptomatic and Claimant had a long record of being able to work without meaningful problems." Advantage's post-hearing brief, p. 10. Advantage's counsel is correct; however in this case, Claimant was symptomatic for at least three weeks before his first accident, according to the ER report generated on the date of the first accident. Such is consistent with the November 20, 2001, MRI that revealed moderate to severe osteoarthritic changes involving the medial compartment and Dr. Kristensen's testimony that such changes develop over time. However, Dr. Kristensen's apportionment of 40% whole person PPI to pre-first accident degeneration is not persuasive given the lack of medical records regarding the 1982 surgical procedure and the fact that Claimant was able to perform strenuous labor without ever seeking any medical treatment for his knee between 1982 and 2001. Claimant

argues that no pre-2001 apportionment is appropriate because there is no evidence of any functional loss or loss of efficiency and the medical opinions expressed in that regard are speculative at best. The Referee agrees. Dr. Cox was reluctant to apportion any degree of impairment to pre-2001 conditions, as he had no medical records to review. Dr. Phillips testified that Claimant's pre-existing disease of the mediofemoral condyle and his surgery in 1982 were important factors in his apportioning 50-50 between pre-existing conditions and the first accident but did not convincingly explain how he was able to quantify those factors or how they resulted in any functional loss. The Referee finds that the record does not support apportionment to pre-2001 conditions.

10. The next question is how to apportion Claimant's 11% whole person PPI between the first and second accidents. Initially, it should be noted that the 1% whole person PPI for the meniscectomy need not be apportioned; there is no evidence that Claimant's chondral/cartilage loss problem in any way contributed to his meniscus tear. Dr. Cox opines that 6% of the 10% should be apportioned to the first accident and 4% to the second accident. However, as pointed out by counsel for Advantage, Dr. Cox was unable to state whether Claimant suffered any further cartilage damage as the result of the second injury or rather by natural progression, which casts doubt on his methodology regarding apportionment. Dr. Phillips opines that of Claimant's 9% whole person PPI, 6% is attributable to the second accident, 1.5% to the first accident, and 1.5% to pre-first accident conditions. However, Dr. Phillips opinion is also flawed in that it ignores the opinions expressed by Dr. Kristensen regarding the extent of the cartilage damage he observed in the 2001 surgery and the nature of the 2003 surgery. Dr. Kristensen testified that the main reason for the 2003 surgery was to repair a torn meniscus and his freshening up of the cartilage was merely incidental. He also opined that the progression of Claimant's cartilage loss

would have continued with or without the second accident. As previously indicated, Dr. Kristensen apportioned PPI as follows: 40% pre-2001, 40% first accident, and 20% second accident. He was not asked to apportion just between the two accidents.

11. The Referee is not particularly impressed by the apportionment analyses of any of the physicians. Dr. Phillips ignored the obvious, Dr. Cox was confused, and Dr. Kristensen was also confused, somewhat equivocal and imprecise in his language (which could be explained by the fact that he has never given testimony before the Industrial Commission, is relatively new to the practice, and does not personally do all but the most straightforward impairment ratings). Nonetheless, as a treating physician and having performed two surgeries on Claimant's right knee, he was the one in a better position to give opinions regarding the effects of the two injuries. He explained that he did not get as good a result as he had hoped regarding the cartilage regeneration procedure and Claimant's loss of cartilage continued to progress between 2001 and 2003. He further explained that the first accident resulted in the majority of Claimant's current problems. Unfortunately, in this Referee's opinion, he assigned far too much blame on Claimant's pre-first accident condition than was warranted and did not provide an apportionment between just the two accidents at issue here. After having carefully considered the opinions of all three doctors and being mindful of the *Urry* admonition that physicians' opinions are advisory only, the Referee finds that ICW is responsible for 65% of Claimant's 10% whole person PPI related to the chondral injury and Advantage is responsible for the remaining 35% including the unapportioned 1% for the meniscal tear.

PPD:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent

impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

Claimant contends he is entitled to PPD of 70% of the whole person due to a decrease in his earning capacity alone with none apportioned to any pre-2001 conditions. ICW argues that

Claimant's assertion that he would have become a union journeyman electrician but for his injuries is speculative and, therefore, his loss of earnings calculation is inflated. Further, Claimant has not looked for other jobs in the electrical field for which he is licensed and could earn more money than he is earning at his current job; he is underemployed. Finally, should the Commission find some PPD above impairment, Advantage should be responsible for the bulk thereof because it was Claimant's accident on their watch in 2003 that created the disability. Advantage argues just the opposite; it was the 2001 injury that resulted in any disability and ICW is on the hook therefor.

12. Claimant's work history consists of loading milk trucks, underground sprinkler system installer, electrician, upholstery trimmer, and hotel maintenance.

13. Claimant graduated from high school in 1980. When Claimant began his employment with Employer, he also started classes as a first year apprentice at BSU vo-tech two nights a week at three hours a class. He kept that schedule for three years and then transferred to the union apprenticeship program with the goal of becoming a journeyman electrician. At the time of the 2003 accident, Claimant was in his 6th term, which was one step, or approximately 30 classroom-training hours, away from union journeyman status. He did not complete the program because Employer had no work available for him within his restrictions. He does, however, have an Idaho journeyman license that allows him to be unsupervised in installations, but he would need to work for a contractor as a journeyman electrician for two years in order to obtain an Idaho contractor's license. According to the Complaints on file, Claimant was earning $16.24 an hour plus benefits at the time of his November 14, 2001, accident and $19.81 an hour plus benefits at the time of his January 7, 2003, accident. He alleges that had he finished the approximately 30 hours of union class work left to become a union journeyman electrician (as

opposed to being an Idaho licensed journeyman), he would be making $36.66 an hour including benefits.

14. Claimant's restrictions are squatting, crawling, stair climbing, crouching, and kneeling occasionally, and limiting his walking on uneven surfaces. Claimant believes his inability to climb ladders is the biggest obstacle in returning to work as an electrician. Dr. Cox testified that the above restrictions would have been appropriate even before Claimant's last accident due to the arthritis and chondral wear present in Claimant's right knee in 2003. A Functional Capacities Assessment accomplished on July 15, 2003, that was labeled as conditionally valid due to submaximal effort on certain portions of the testing showed Claimant to be in the light-to-medium work category. Claimant testified that he agreed with the assessment.

15. Claimant worked with ICRD consultant Bob Reidelberger from March of 2003 to January of 2004. In his case notes, Mr. Reidelberger identified the following transferable skills: apprentice/journeyman electrician, mechanic skills, equipment operation, upholstery, and irrigation systems. Claimant attended a three-day Job Service workshop and was checking with them for job leads daily. Mr. Reidelberger identified some potential employment opportunities such as retail/wholesale counter sales in the electrical field, manufacturing representative, and estimator. Claimant does not believe he is qualified to be an estimator and he would rather work with objects than people which would eliminate the sales positions. Using Dr. Cox's restrictions, Mr. Reidelberger believed Claimant could be employed at Lowe's or Home Depot in the $10.00-$11.00 an hour range; security and fire alarm system installer in the $12.00-$16.00 an hour range (although Mr. Reidelberger conceded there may be some aspects of the job that could be beyond his restrictions); and Micron Technology at about $9.50 an hour. Mr. Reidelberger closed

Claimant's file because Claimant informed him he was going to obtain a CDL and pursue truck driving as a career; he did not follow through with that plan.

16. Claimant is currently employed at Metcalf Landscaping; he started in March of 2004 at $11.00 an hour with no benefits. His duties include supervising the sprinkler repair division and doing estimates for sprinkler repair work. The work is seasonal; generally from March through November. At the time of the January 5, 2005, hearing, Claimant had been laid off. However, he testified that he likes working for Metcalf and planned on returning in March. He hopes to eventually obtain a better pay package with them.

17. The Referee finds, based on Claimant's restrictions, that Claimant cannot return to work as an apprentice/journeyman electrician. There is little evidence in this matter regarding any loss of access to Claimant's job market. He has suffered some loss of wage earning capacity. The Referee finds it too speculative to conclude that Claimant would have completed the 30 or so hours required to complete his union journeyman program and to conclude that the $36.66 an hour is an accurate reflection of his earning potential had he not been injured. *See, McClurg v. Yanke Machine Shop*, 123 Idaho 174, 845 P.2d 1207 (1993). The Referee finds that the $19.81 he was earning at the time of injury is more accurate in defining Claimant's earning capacity at the time of his last injury. He now makes $11.00 an hour without benefits in a job for which he is highly qualified. The Referee cannot find that he is underemployed. The Referee noted at hearing that Claimant was articulate and he clearly has the ability to learn. Whether he remains employed at Metcalf Landscaping or not, the Referee is confident that, with his proven skills and abilities, he will not suffer any significant periods of unemployment. While recognizing that arriving at a reasonable disability figure is not a science, the Referee finds that when considering Claimant's age, education, work history and ethic, his demeanor and

motivation, he has incurred a disability inclusive of his 11% whole person PPI of 40% of the whole person.

Apportionment:

Idaho Code § 72-406 (1) provides that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. The Idaho Supreme Court has held that pursuant to Idaho Code § 72-406, employers do not become liable for all of the disability resulting from the combined causes of a pre-existing injury and/or infirmity and the work-related injury, but only for the that portion of the disability attributable to the work-related injury. *Horton v. Garrett Freightlines, Inc*., 115 Idaho 912, 929, 772 P.2d 119, 136 (1989). The Court has further held that any apportionment under Idaho Code § 72-406 must be explained with sufficient rationale to enable it to review whether the apportionment is supported by substantial and competent evidence. *Reiher v. American Fine Foods*, 126 Idaho 58, 62, 878 P.2d 757, 761 (1994). Further, the Commission is not to automatically apply the *Carey* formula in less-than-total disability cases. *Reiher*, *Id.*

18. Because Claimant worked for almost 20 years after his 1982 surgery in relatively heavy labor without any appreciable difficulty and because there is no impairment from that injury in the record that can be said to have prolonged or increased Claimant's disability, the Referee declines to apportion any of Claimant's PPD to pre-2001 events. However, apportionment of that PPD between Advantage and ICW is appropriate.

19. The question to be answered here is which of Claimant's two injuries contributed the most to his inability to return to work as an electrician and, thus, contributed the most to his

PPD. Claimant testified that the restriction from climbing ladders is the primary reason why he cannot return to work as an electrician. Dr. Kristensen testified that, in his opinion, the restrictions imposed upon Claimant were due to the chondral/cartilage injury from the first accident, rather than the meniscal injury from the second accident and the "primary contributor" to Claimant's inability to return to work as an electrician was the first accident. Further, the inability of Claimant to extend his right knee is why he cannot climb ladders and that is due to the progression of the chondral injury, not the meniscus tear from the last accident. Finally, Dr. Kristensen testified: "A meniscus tear in 2003 would not – I would not expect that to disable an electrician." Dr. Kristensen's Deposition, p. 49. Dr. Cox testified that the restrictions he imposed would have been appropriate even before the last accident due to the medial compartment joint space narrowing. He also testified that the progression of the chondromalacia was inevitable, but could have been hastened by trauma. He was unable to tell whether or not the last accident caused additional damage to the cartilage. Dr. Phillips disagrees with Drs. Kristensen and Cox regarding the seriousness of the first accident and injury but acknowledges that Claimant's restrictions are due to the chondromalacia. Dr. Phillips was relying on the incorrect operative report when he opined that there was more cartilage damage done in the second accident.

20. The Referee finds the opinions expressed by Drs. Kristensen and Cox more persuasive than those of Dr. Phillips. Dr. Kristensen performed both operations and was in a uniquely better position to observe and compare the condition of Claimant's right knee in both 2001 and 2003. While no physician has assigned a percentage to the degree of contribution to Claimant's PPD of each accident and there is no way to totally objectively arrive at such a

percentage, nonetheless, the Referee finds it reasonable to apportion 85% to the first accident (ICW) and 15% to the second accident (Advantage).

CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to PPD benefits of 40% of the whole person inclusive of his 11% whole person PPI.

2. ICW is responsible for 85% and Advantage is responsible for 15% of Claimant's PPD pursuant to Idaho Code § 72-406.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __25th __ day of ___May__, 2005.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __1st __ day of ___June__, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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